No. 84-1104

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In the Supreme Court of the United States

OCTOBER TERM, 1984

JEROME PRZYBYLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Hodgdon v. *United States*, 365 F.2d 679, cert. denied, 385 U.S. 1029 3

United States v. *Cunningham*, 509 F.2d 961 3

United States v. *Danehy*, 680 F.2d 1311 2

United States v. *Ferrone*, 438 F.2d 381, cert. denied, 402 U.S. 1008 3

United States v. *Johnson*, 542 F.2d 230 2-3

United States v. *Martinez*, 465 F.2d 79 3

United States v. *Simon*, 409 F.2d 474, cert. denied, 396 U.S. 829 3

Statutes:

18 U.S.C. 111 ..... 1, 2

26 U.S.C. 7212(a) 1, 2

26 U.S.C. 7212(b) 2

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Petitioner contends that he acted justifiably in reliance on an IRS pamphlet when he drew a gun on revenue officers attempting to effect a seizure of his property.

1. Following a jury trial in the United States District Court for the District of Alaska, petitioner was convicted of assaulting an IRS agent, in violation of 18 U.S.C. 111, and of impeding the administration of the tax laws, in violation of 26 U.S.C. 7212(a). He was sentenced to consecutive terms of three years' imprisonment on the former count and to one year's imprisonment on the latter. The court of appeals affirmed (Pet. 19-28) and denied a petition for rehearing (Pet. 29).

The facts established at petitioner's trial were essentially as follows. On March 8, 1983, petitioner was informed that IRS agents would arrive at his premises later that day to effect seizure of his real property in satisfaction of his

unpaid tax liabilities. When the three agents arrived, petitioner, without identifying himself, asked that they leave (Pet. 20). Despite petitioner's request, the agents began to post seizure notices around the premises. Petitioner then produced a hand gun, clicked off the safety mechanism, and, waving the gun in the agents' general direction, escorted them off his property (*ibid.*).

Petitioner was indicted for assaulting an IRS agent, in violation of 18 U.S.C. 111, and impeding the administration of the tax laws and attempting to rescue property after it had been seized, in violation of 26 U.S.C. 7212(a) and (b), respectively. The jury convicted petitioner of the first two offenses and acquitted him of the third. The court of appeals affirmed in a per curiam opinion (Pet. 19-28).

2. Petitioner contends (Pet. 7-14) that his conviction violates due process because he acted in reliance on IRS Publication 586A, which informs taxpayers: "You have the right to refuse to permit collection personnel to enter upon your private property when the purpose of the visit is to conduct a seizure of your assets" (Pet. 30). Petitioner concedes that this pamphlet "in no way implies the use of force as an alternative to recognized procedure" (*id.* at 8). He nevertheless argues that his threatened use of deadly force was justified by the agents' alleged nonconformity with IRS administrative practice (*id.* at 8).

This claim is plainly meritless. Petitioner's use of a weapon was unlawful, irrespective of any right he may have had to refuse to permit IRS agents to enter his property. The courts of appeals are in agreement that a citizen has no right forcibly to resist an arrest or search by one known to be a government officer, even where it is subsequently determined that the officer's action was improper. See, *e.g.*, *United States* v. *Danehy*, 680 F.2d 1311, 1315-1316 (11th Cir. 1982); *United States* v. *Johnson*, 542 F.2d 230, 232-233

(5th Cir. 1976); *United States* v. *Cunningham*, 509 F.2d 961, 963 (D.C. Cir. 1975); *United States* v. *Martinez*, 465 F.2d 79, 82 (2d Cir. 1972); *United States* v. *Ferrone*, 438 F.2d 381, 389-390 (3rd Cir.), cert. denied, 402 U.S. 1008 (1971); *United States* v. *Simon*, 409 F.2d 474, 477 (7th Cir.), cert. denied, 396 U.S. 829 (1969); *Hodgdon* v. *United States*, 365 F.2d 679, 685 (8th Cir. 1966), cert. denied, 385 U.S. 1029 (1967). As noted by the Fifth Circuit in *Johnson* (542 F.2d at 233):

> We do not need citizen avengers who are authorized to respond to unlawful police conduct by gunning down the offending officers. Other remedies are available for those police actions that are based on unreasonable suspicions or technically defective warrants.

Petitioner's asserted belief that "court action is not a remedy" (Pet. 10) plainly does not justify his threatened use of deadly force against IRS personnel. Petitioner alleges no conflict among the circuits on this question and it warrants no further review.

Petitioner also contends (Pet. 15-18) that his conviction should be reversed because the testimony of the IRS officers concerning the aiming of the gun was inconsistent and deliberately misleading. As the court of appeals concluded (*id.* at 26), however, the agents' pretrial statements were not inconsistent with their trial testimony. Agent Atchison testified both before the grand jury and at trial that she saw the gun pointed directly at Agent Erickson (*id.* at 26, 31-34). Agent Erickson's pretrial statement that he did not see the gun pointed directly at him was not inconsistent with his trial testimony that the gun was pointed in his direction from time to time (*id.* at 27, 43, 47). And Agent DeMay's pretrial statement that "he never saw the gun pointed directly at anyone" was not inconsistent with his trial testimony that the gun was pointed "in the direction of" Agent

Erickson (Pet. 26, 39-40). Agent DeMay explained any apparent inconsistency on cross-examination: "[The gun] was pointed toward the direction of Dave Erickson. I did not see it pointed directly at him but I did see it at that angle" (*id.* at 27, 42).

Even if there were inconsistencies between the agents' pretrial statements and their trial testimony, that would be no basis for setting aside the jury's verdict. Petitioner received copies of the agents' pretrial statements and used them during cross-examination (Pet. 27). The jury was thus aware of the alleged discrepancies and nonetheless found the evidence sufficient to convict. There is no basis for further review of this factual question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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